Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

(18)

No. 01-963

In the Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

William G. Jungbauer
Counsel of Record
Keith A. Queensen
YAEGER, JUNGBAUER, BARCZAK
& VUCINOVICH, PLC
745 Kasota Avenue
Minneapolis, MN 55414
(612) 333-6371

Counsel for Amicus

August 19, 2002

2002 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

3 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. IN ENACTING THE FEDERAL EMPLOYERS' LIABILITY ACT, IT WAS THE INTENTION OF CONGRESS THAT WHEN THE NEGLIGENCE OF THE EMPLOYER RAILROAD COMBINED WITH THE NEGLIGENCE OF A THIRD PARTY TO CAUSE INJURY TO ONE OF ITS EMPLOYEES, THE RAILROAD WOULD BE LIABLE FOR ALL INJURIES SUSTAINED BY THE WORKER (SAVE FOR THOSE DAMAGES ATTRIBUTABLE TO THE WORKER'S OWN CONTRIBUTORY NEGLIGENCE) 7

II. THE POSITION ADVOCATED BY THE RAILROAD INDUSTRY THREATENS TO WEAKEN THE FEDERAL EMPLOYERS' LIABILITY ACT IN NUMEROUS FUNDAMENTAL RESPECTS 19

A. The Position Advocated by the Railroad Industry Would Negate Congress' Intention to Create a Uniform Right and Remedy for Injured Railroad Workers, and Make Their Recovery Dependent Upon the Vagaries of State Law 20

TABLE OF CONTENTS (continued)

Page

B. The Position Advocated by the Railroad Industry Would Effectively Eliminate the Railroad's Continuing, Non-delegable Duty to Provide Its Employees With a Safe Place to Work Under the FELA 21

C. The Position Advocated by the Railroad Industry Would Undermine the Broad, Statutorily Unique Discretion Afforded to Injured Railroad Workers Under the FELA With Regard to Selection to Forum 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Atchison, Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) 9

Bailey v. Central Vermont Ry., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943) 5, 21

Baltimore & O. R. Co. v. Kapner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28 (1941) 24

Boyd v. Grand Trunk Western R.R. Co., 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949) 6, 24

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964) 7

Chicago M. & St. P. Ry. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 70 L.Ed. 1041 (1926) 20

Coats v. Penrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995) 10, 15-17

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) 4

Dice v. Akron C. & R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) 4

Ford v. Burlington Northern Railroad Co., 250 Mont. 188, 819 P.2d 169 (1991), *aff.* 504 U.S. 648, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992) 14

TABLE OF AUTHORITIES (continued)

Page

Gaulden v. Burlington Northern, Inc., 232 Kan. 205, 654 P.2d 383 (1982) 9

Graham v. Thompson, 357 Mo. 1133, 212 S.W.2d 770 (1948), *cert. den.* 335 U.S. 870, 69 S.Ct. 166, 93 L.Ed 414 (1948) 20

Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) 9

Mazyck v. Long Island Railroad Co., 896 F.Supp. 1330 (E.D.N.Y. 1995) 10, 15

New York C. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 (1917) 20

Ries v. National Railroad Passenger Corp., 960 F.2d 1156 (3rd Cir. 1992) 14

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) 8

Seaboard Airline R. Co. v. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062 (1914) 21

Shenker v. Baltimore & Ohio Railroad Co., 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709 (1963) 11, 21

Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430 (5th Cir. 1988), *cert. denied* 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989) 15

TABLE OF AUTHORITIES (continued)

Page

Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958) 5, 8, 10, 21

St. Louis Southwestern Ry. v. Board of County Comm'rs, 716 F.Supp. 13 (D. Kan. 1989) 10

Stephens v. Southern Pacific Transportation Co., 991 F.Supp. 618 (S.D. Tex. 1998) 10

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed.2d 1282 (1949) 9

Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534 (1993), *cert. den.* 514 U.S. 1037, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995) 12

Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed.2d 497 (1949) 8

STATUTES

45 U.S.C. § 51 ..... 1, 2, 8

45 U.S.C. § 51, *et seq.* (Federal Employers' Liability Act) . *passim*

45 U.S.C. § 53 ..... 2, 9

45 U.S.C. § 56 ..... 6, 23

TABLE OF AUTHORITIES (continued)

Page

OTHER AUTHORITIES

11 Am. Jur. Trials FELA Litigation § 125 19

11 Am. Jur. Trials, FELA Litigation, §§ 17, 18 22

40 Cong. Rec. 4606 (1906) 7

45 Cong. Rec. at 4034-4035 (1910) 14, 24

6 A.L.R.3d 1307 ("Claim, for Contribution or Indemnity Against Joint Tortfeasor, or Employer Liable to Employee Under Federal Employers' Liability Act, as Affected by Contributory Negligence of Employee") ... 17

Jerry J. Phillips, "An Evaluation of the Federal Employers' Liability Act," 25 San Diego L. Rev. 49 (1988) 14

Restatement (Third) of Torts on Apportionment of Liability § 17 cmt. A at 147 16

Senate Report No. 432, 60 1st Cong., 2d Sess. 24

BRIEF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The Brotherhood of Locomotive Engineers ("BLE") is North America's oldest rail labor union. Established in 1863, the purpose of the union, as stated in the BLE Constitution, is "to combine the interests of locomotive engineers or other persons in railway service . . . (to) guard their financial interests, and promote their general welfare and safety." The BLE's total membership is more than 59,000, and its active members include 35,000 railroad workers in the United States and Canada.

The Brotherhood of Locomotive Engineers believes that the position advocated by the Petitioner and the railroad industry (through the amicus brief of the Association of American Railroads) with regard to principles of joint and several liability under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, threatens to undermine and negate central protections afforded by Congress to injured railroad workers under the FELA. The position advocated by the Petitioner and the railroad industry would fundamentally reshape and refashion principles of liability under the FELA which have been in place for nearly a century. The BLE further believes that the position advocated by the Petitioner and the railroad industry would disturb virtually every aspect of Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the FELA, in a manner antithetical to the intentions of Congress.

The BLE offers this Brief as amicus curiae in support of Respondents. For the reasons set forth below, the BLE respectfully

---

[1]No person or entity other than BLE has made monetary contributions toward this Brief and no counsel for any party authored this Brief in whole or in part. Letters of consent by the parties to the filing of this Brief have been filed with the Court.

submits that this Court should reject Petitioner's argument that principles of joint and several liability be abolished or curtailed under the FELA. This Brief does not address the first question presented by N&W's Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Brotherhood of Locomotive Engineers represents over 35,000 railroad workers throughout the United States and Canada, and has been in existence for nearly 140 years. In virtually every Congressional session over the past several decades, the Brotherhood of Locomotive Engineers has been forced to resist lobbying efforts by the railroad industry intended to abolish or weaken the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* The efforts of the railroad industry have proven unsuccessful, however, and the statute – in existence for nearly a century – has remained substantively unchanged for over 50 years. (Amendments prior to that only strengthened the Act.) As reflected in the amicus briefing of the Association of American Railroads, the railroad industry is now attempting to seize upon the unusual facts of this case to accomplish through the judiciary what it has not been able to accomplish legislatively – the abolition or limitation of key protections afforded by Congress to injured railroad workers through the FELA.

The railroad industry seeks to accomplish this by urging this Court to disregard the historic mandate of Congress, and nearly a century of judicial precedent, and abolish perhaps the core tenet of the FELA – that if a railroad's negligence, in whole or in part, plays any role in an employee's receipt of injury, it is responsible for all damages sustained by its employee, except those attributable to the employee's own contributory negligence. 45 U.S.C. §§ 51, 53. The Brotherhood of Locomotive Engineers accordingly offers this amicus brief to address the critical apportionment issue presently before this Court.

Due to the transitory nature of railroad work, railroad employees are frequently required to work in states far from their homes, upon property owned by industries with whom their employers have contracted. Their duties often demand that they work upon trackage and equipment owned by other railroads, and place them in a position where their safety – and, indeed, their very lives – may depend upon the care and caution exercised by employees of other railroads and enterprises. The Congressional mandate that railroad employers be responsible for all damages caused in whole or in part by their negligence, except for the contributory negligence of the employee himself, ensures that workers are actually compensated for their injuries, and that their rights under the FELA are not rendered illusory by requiring them to seek recompense not only from the railroad which employed them, but also from persons and entities in remote locations, against whom prosecution of a legal claim, and from whom collection of any judgment, may be difficult or cost prohibitive. The Congressional scheme behind the FELA permits railroads to recoup damages attributable to third-party negligence through contracts of indemnification and legal claims for contribution. This Congressional scheme recognizes, however, that the burden of seeking recompense when third-party negligence is involved is more fairly and appropriately placed upon a railroad engaged in interstate commerce, than upon a lone injured railroad worker who has no control over where his employer sends him to perform his duties, or the persons, third-party railroads, or industries with whom his employer requires him to work.

To be clear, the railroad industry has seized upon this appeal as an opportunity to attempt to undermine and circumvent the central principle of liability of a nearly century-old Federal system of compensation for injured railroad workers. The position advocated by the railroad industry would also critically undermine, and at times entirely negate and destroy, other central Congressional objectives behind the FELA. To this end, the railroad industry seeks to circumvent and thwart important rights and protections afforded to

injured railroad workers under the Federal Act in numerous fundamental respects:

1. **The Federal Employers' Liability Act was intended as remedial social legislation to promote, ease, and facilitate recovery by workers injured in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994). Requiring railroad employees to commence costly actions against other persons or entities – potentially located a great distance away and of possibly questionable financial solvency – would create an obstacle and impediment to full and proper recovery which was not intended by Congress, and which has at no time existed during the century-long history of the FELA. In practical terms, in many instances, full and proper compensation to injured railroad workers would no longer be achieved, and the primary purpose for which the FELA was enacted would be thwarted. The families of workers killed in the line of duty would also, in many instances, be effectively left without proper financial recovery in a broad class of cases where third-party negligence is involved.**

2. **In enacting the Federal Employers' Liability Act, Congress intended to create a uniform right and remedy for injured railroad workers, which would not be affected by the vagaries of state law. *Dice v. Akron C. & R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952). Requiring injured railroad workers to commence common law claims against other industries or individuals in this large class of cases involving potential third-party negligence would undermine the national uniformity intended by Congress, and make the recovery received by injured railroad workers to a large part dependent upon the negligence law of the state where they happened to be injured. Certain common law defenses – which Congress**

intended to remove as an impediment to recovery by injured railroad workers – would become prominent in railroad personal injury litigation.

3. **One of the purposes of the Federal Employers' Liability Act was to promote safety within the railroad industry. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958). To this end, courts have recognized that the FELA imposes upon railroads a continuing, non-delegable duty to provide their workers with a safe place in which to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). The Congressional scheme behind the FELA recognizes that a railroad requiring its employees to work at locations controlled by a third party is in a better position to ensure that those locations are safe than is the individual worker. *Sinkler*, *supra at* 329-30, 761-62. The continuing, non-delegable duty imposed under the FELA is made meaningful through the principle that employer railroads are deemed fully liable for all damages caused in whole or in part by their negligence, save those caused by the worker's contributory negligence. If adopted, the position advocated by the railroad industry would, in practical terms, mean that railroads no longer have a continuing, non-delegable duty to provide their employees with a safe place to work, but could avoid liability by shifting the blame to others, significantly increasing the hazards attendant to an already dangerous industry.**

4. **One of the principal protections afforded to injured railroad workers under the FELA is the right to selection of forum. Congress recognized that it would be unduly burdensome for railroad workers, frequently called upon to perform their duties in states far away from their homes, to be required to maintain suit where the accident**

occurred. A liberal venue provision was accordingly established under the FELA, providing injured railroad workers with broad and statutorily unique discretion in determining the forum in which their action will be tried. 45 U.S.C. § 56. Under the FELA, choice of venue is a substantial, substantive right afforded by Congress to injured railroad workers. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949). Congress' intention to permit FELA plaintiffs to choose their legal forum would be effectively defeated through adoption of the position advocated by the railroad industry in this litigation, the practical effect of which would be to force injured railroad workers in a large class of cases to bring suit in distant locations where jurisdiction over third parties might be obtained in order to have a chance at obtaining full and complete compensation for their injuries.

In sum, the position advocated by the railroad industry in this appeal would disturb – in truly fundamental ways – Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the Federal Employers' Liability Act. The railroad industry should not be permitted to accomplish by judicial fiat what it has not been able to obtain through the legislative process in proposing fundamental modification of this nearly 100-year-old law.

ARGUMENT

I. IN ENACTING THE FEDERAL EMPLOYERS' LIABILITY ACT, IT WAS THE INTENTION OF CONGRESS THAT WHEN THE NEGLIGENCE OF THE EMPLOYER RAILROAD COMBINED WITH THE NEGLIGENCE OF A THIRD PARTY TO CAUSE INJURY TO ONE OF ITS EMPLOYEES, THE RAILROAD WOULD BE LIABLE FOR ALL INJURIES SUSTAINED BY THE WORKER (SAVE FOR THOSE DAMAGES ATTRIBUTABLE TO THE WORKER'S OWN CONTRIBUTORY NEGLIGENCE).

At the turn of the last century, Congress became appalled by the carnage American railroads were leaving in the wake of their operations. As stated by Representative Mann on the floor of the United States House of Representatives in 1906:

> In three months of last year there were 931 railroad employees killed at their posts of duty. In three months of last year, there were 13,217 railroad employees injured at their post of duty, not mentioning those who met such slight injuries as only required layoff of two or three days.

40 Cong. Rec. 4606 (1906). In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3, 84 S.Ct. 1113, 1115, 12 L.Ed.2d 89, 91 (1964), the United States Supreme Court states:

> Railroad work at that time was indeed dangerous. In 1888 the odds against a railroad brakeman's dying a natural death were almost four to one; the average life expectancy of a switchman in 1893 was seven years.

Given the terrible scale of injury and death caused by railroad operations, Congress examined the laws to which employees were required to turn for redress. Congress found those laws wholly

deficient. "(J)udges had created numerous defenses – fellow-servant rule, assumption of risk, contributory negligence – so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work." *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed.2d 497, 507 (1949) (J. Douglas concurring).

In response to the dangers of the railroad workplace and the deficiencies in the employee's common law remedies, Congress determined to change the common law. It accomplished this through enacting the FELA. "The law was enacted because Congress was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493, 500 (1957). The FELA is "an avowed departure from the common law." *Sinkler v. Missouri Railroad Co.*, 356 U.S. 326, 78 S.Ct. 758, 762, 2 L.Ed.2d 799, 802 (1958).

In enacting the FELA, Congress, in the words of the *Rogers* court, "stripped" railroads of common law defenses which had previously acted as a bar to recovery by injured workers. *Rogers*, 352 U.S. at 507-508, 77 S.Ct. at 449, 1 L.Ed.2d at 500. Congress further supplanted the common law duty owed by a master to its servant "with the far more drastic duty of paying damages for injury and death at work due in whole or in part to the employer's negligence." *Rogers*, 352 U.S. 500, 507, 77 S.Ct. 443, 448 (1956). Congress achieved this purpose through the plain language of 45 U.S.C. § 51:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . resulting ***in whole or in part*** from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . . (Emphasis added.)

By this simple and direct language, "it is clear that the general Congressional intent was to provide liberal recovery for injured

workers . . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382, 388 (1958).[2]

The only exception carved out by Congress to the mandate that an employer railroad be held liable for all damages caused in whole or in part by its negligence was for damage directly caused by the contributory negligence of the employee himself. *See* 45 U.S.C. § 53 which, in effect, established a system of pure comparative negligence under the FELA. Even this potential offset to railroad liability was limited by Congress, however, and, under Section 53, contributory negligence may not be raised as a defense at all when the railroad's violation of a Federal railroad safety statute has played any role in the worker's receipt of injury. 45 U.S.C. § 53.

Both Federal and state courts throughout the country have historically recognized that the liability scheme established by Congress – rendering an employer railroad liable for all damages caused in whole or in part by its negligence, with the only offset being for the employee's contributory negligence under certain limited circumstances – was, in effect, intended to create a system of joint and several liability in cases where railroad negligence combined with negligence of a third party to cause injury to a worker. As stated by the court in *Gaulden v. Burlington Northern, Inc.*, 232 Kan. 205, 654 P.2d 383, 389 (1982):

> FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of

---

[2]The United States Supreme Court has historically made clear its commitment to liberally construe the FELA to effectuate its remedial purposes. "We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish (Congress') objectives.'" *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563, 571 (1987) (editorial parenthetical in text), *quoting Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030, 93 L.Ed.2d 1282, 1298 (1949).

> the fault of any third person. Liability is thus imposed upon the carrier for all damages sustained by its employee except any part attributable to the negligence of the employee, if the injury is wholly or partly caused by the railroad's negligence. The purpose of the Act is to require the employer to pay damages to an injured employee if the employer in any way caused or contributed to the injury.

In accord, *see Stephens v. Southern Pacific Transportation Co.*, 991 F.Supp. 618, 619 (S.D. Tex. 1998) ("FELA incorporates traditional joint and several liability principles, such that the employer may be jointly liable with third parties and may seek indemnification from such other tortfeasors"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1135 n.26 (5th Cir. 1995) (FELA incorporates "traditional principles of joint and several liability"); *Mazyck v. Long Island Railroad Co.*, 896 F.Supp. 1330, 1333 (E.D.N.Y. 1995) ("(C)ourts that have considered this question have concluded that the well established principles of joint and several liability apply to cases under the FELA"); *St. Louis Southwestern Ry. v. Board of County Comm'rs*, 716 F.Supp. 13, 14 (D. Kan. 1989) ("FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of the fault of any third person").

The United States Supreme Court has recognized that the purpose of Congress in enacting the FELA was to shift certain burdens which had previously fallen upon injured railroad workers to the railroads themselves. As stated by the United States Supreme Court in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958):

> This statute, an avowed departure from the rules of the common law (citations deleted), was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. (Citations deleted.) The cost of human injury, an inescapable expense of railroading, must

> be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. (Citations deleted.) The Senate committee which reported the Act stated that it was designed to achieve the broad purpose of promoting "the welfare of both the employer and the employee, by adjusting the losses and injuries inseparable from injury and commerce to the strengths of those who in the nature of the case ought to share the burden."

Railroad work is, to a large extent, transitory in nature, and railroad workers are frequently required by their employers to perform their duties in states far away from their home, working with individuals and entities over whom they have no control, but with whom their employers have chosen to contract. Simply put, the Congressional scheme behind the FELA recognizes that the burden of seeking recompense when third-party negligence is involved is more fairly and appropriately placed upon the railroad engaged in interstate commerce than upon the individual worker who has no control over where his employer sends him to perform his duties or the persons or entities with whom his employer requires him to work. To this end, the United States Supreme Court has historically recognized that railroading is a "unitary enterprise" involving many railroads, industries, and workers, and that railroads in FELA actions should not be permitted to escape liability by attempting to place blame on someone else involved in that "unitary enterprise." In *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 11, 83 S.Ct. 1667, 1673-74, 10 L.Ed.2d 709 (1963), for example, the employer railroad sought to avoid liability under the FELA by claiming that the car upon which its employee was injured was owned by another railroad. In rejecting the railroad's claim that it should not be held negligent for conduct attributable to this third party, the United States Supreme Court states:

> Although recovery in this case is supported by the common law, it is also required by any reasonable construction of the Federal Employers' Liability Act itself. As we stated in

Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799: ***"It was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor."*** If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk. *Cf. Texas & Pac. R. Co. v. Archibald*, 170 U.S. 665, 673, 18 S.Ct. 777, 42 L.Ed. 1188. (Emphasis added.)

The FELA's legislative history makes clear that Congress recognized that since it was the railroad employer which had effective control over the locations where its employees were required to work, and the third-party actors to whom its employees would be exposed, any burden resulting from third-party negligence should properly be placed on the employer. In *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 541 (1993), *cert. den.* 514 U.S. 1037, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), the court discusses the legislative history in this regard:

> The FELA was designed not simply to discourage negligent conduct, for indeed, the common law at the FELA's passage provided rail workers an action for negligence. Rather, the Act was designed with a broader purpose in mind: "To provide liberal recovery for injured workers," *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1957), and thus, "to put on the railroad industry some of the costs for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*,

336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949) (concurring opinion of Justice Douglas). It accomplished these purposes by creating a statutory scheme that "stripped" [an employer] of his common law defenses," and granted recovery if the "employer[s] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-7, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1956). These dramatic changes evinced a clear Congressional intent "favoring unburdened and expeditious recoveries" by rail workers. *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979).

The FELA's legislative history testifies to this truth:

> [T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.
>
> ***It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor case (210 U.S. 281), "measurably control their causes."***
>
> The passage of the original Act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as Congressional power can extend, those rules of the common law which the President, in a recent speech at Chicago, September 16, 1909,

> characterized as "unjust." President Taft in his address . . . referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."
>
> (Quoting from 45 Cong. Rec. 4041 (1910)). (Emphasis added.)

The legislative history of the Federal Employers' Liability Act further evidences an appreciation by Congress that requiring railroad workers to travel a great distance in order to obtain full recovery for their injuries would place an onerous burden upon those workers and, in many instances, would render their rights under the FELA effectively meaningless. *See, Ford v. Burlington Northern Railroad Co.*, 250 Mont. 188, 819 P.2d 169, 173-174 (1991), *aff.* 504 U.S. 648, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992), *citing* 45 Cong. Rec. at 4034-4035 (1910). Again, this burden was deemed more appropriately placed upon the employer railroad (which, if subject to the Act, was engaged in active interstate commerce), than upon the individual employee.

Through this appeal, the railroad industry attempts to have this Court shift the burden of recouping damages from negligent third parties from the employer railroad – where Congress, for sound public policy reasons, placed that burden – to the injured worker himself. No principled reason exists for such a radical shift. Although not as hazardous as it was at the turn of the last century, railroad work "even today is one of the most dangerous industries in this country." *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156, 1158 (3rd Cir. 1992); *citing* Jerry J. Phillips, "An Evaluation of the Federal Employers' Liability Act," 25 San Diego L. Rev. 49, 50-52 (1988). Moreover, the burden of requiring injured railroad workers to track down potentially negligent third parties of questionable solvency in remote parts of the country to obtain recovery for their injury is no less onerous today than it was 100 years ago.

Petitioner's argument that Congress could not have meant to establish what amounts to a system of joint and several liability under the FELA because the principle of joint and several liability was not widely recognized at the time of enactment of the FELA is inaccurate. See the excellent discussion of the historical development of the rule of joint and several liability in *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1124-1130 (5th Cir. 1995). This case notes that "the traditional rule of joint and several liability can be traced back to eighteenth century England, in the case of *Hill v. Goodchild*, 98 Eng. Rep. 465, 5 Buff. 2790 (K.B. 1771)" and demonstrates that the rule had become widely accepted in American common law by the time of enactment of the FELA. *Coats, supra at* 1124-1125. Indeed, numerous courts have forthrightly noted that there is nothing in the language of the FELA "intended to abrogate the common-law principles of joint and several liability" *in existence at the time the FELA was enacted. Mazyck v. Long Island Railroad Company*, 896 F.Supp. 1330, 1332-1333 (E.D.N.Y. 1995). In accord, *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 (5th Cir. 1988), *cert. denied* 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989).

Petitioner further argues that, regardless of the intent of Congress at the time of enactment of the FELA, this Court should, in effect, declare that principles of joint and several liability are no longer viable under the common law, and hence declare that principle no longer applicable in FELA cases. Petitioner's suggestion that principles of joint and several liability have been repudiated by the courts of this country in recent years, and that the common law has come to reject this rule, is entirely unfounded. Indeed, the American judiciary has, in recent years, repeatedly endorsed the fundamental logic and fairness of the principle of joint and several liability. (See expansive survey of state cases in Brief Amica Curiae of American Law Professors in Support of Respondents, Section D.) With only a handful of exceptions, changes in state joint and several liability laws in recent years have resulted from legislative action in response to intensive "tort reform" lobbying. *Coats, supra at* 577. Moreover, when principles of joint and several liability have been addressed by

state legislatures, joint and several liability has not typically been rejected, but only modified. *Restatement (Third) of Torts on Apportionment of Liability* § 17 cmt. A at 147.

The fact that recent changes in state joint and several liability law have generally been enacted by state legislatures, and not imposed by the courts, demonstrates the impropriety of the railroad industry's attempt to utilize this appeal as a device to attempt to obtain through the judiciary a fundamental change in the Federal Employers' Liability Act it has been unable to obtain from Congress. In *Coats, supra*, the court observed that any change in joint and several liability law is one uniquely appropriate for legislative determination. To this end, the Fifth Circuit Court of Appeals notes that those state legislatures which have elected to modify traditional state law principles of joint and several liability have done so in highly divergent ways and that seven distinctly different statutory schemes have emerged. *Coats, supra* at 1133. The court further notes that many states have adopted a hybrid of these basic schemes, creating even additional systems of reallocation and apportionment. The court states, *supra at* 1133:

> Significantly, however, most of the states that modify joint and several liability have adopted a hybrid approach by enacting statutory schemes that incorporate more than one of the above-mentioned trends. . . . ***Each scheme represents a unique blend of policy considerations weighed by the respective state legislatures.*** (Emphasis added.)

In *Coats*, a number of maritime industries sought to judicially overturn the principle of joint and several liability which had been applied under general maritime law for more than a century. The court rejected their argument, recognizing the sound public policy principles which support application of this rule. *Coats, supra at* 1136. The court further held that even if a change in the joint and several liability rule were warranted, such a fundamental change in

the law as proposed by the maritime industry was properly accomplished by Congress, and not the judiciary. The court states:

> The wide spectrum of legislative enactments across the country demonstrates the various policy objectives obtainable by altering joint and several liability. Most notable are the distinctions based upon causes of action and types of damages. The Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to Congressional action here is the wiser course. Even here we stand on maritime tradition, for even the earliest jurists appear to have counseled deference to the Legislature.
>
> . . .
>
> This turn of the political light upon tort law only stiffens our resolve not to attempt to run in front of the Congress. Leading a political charge is not an appropriate role for a Federal court, not even for a Federal court sitting in admiralty.

It should finally be emphasized that the system presently in effect fully permits employer railroads to recoup their losses from negligent third parties through contracts of indemnification or lawsuits seeking contribution, and is in no sense inequitable.[3] The court in *Coats*,

---

[3]In the Annotation at 6 A.L.R.3d 1307 ("Claim, for Contribution or Indemnity Against Joint Tortfeasor, or Employer Liable to Employee Under Federal Employers' Liability Act, as Affected by Contributory Negligence of Employee"), the extent to which American railroads have been able to recoup any losses attributable to third-party negligence under the present legislative scheme is made clear. This Annotation also makes clear the pervasive extent to which the American railroad industry has been able to protect itself from liability for third-party negligence through contract: "To provide assurance of contribution or indemnity from the other party under such circumstances, employers who are subject to the provisions of the FELA often obtain agreements from their customers, especially in connection with spur track arrangements, that the customer will provide contribution or indemnity to the employer if the employer becomes liable for certain injuries. The contract is likely to provide for fifty percent contribution or for full

supra, notes that the employer is in a far better position than the employee to contractually protect itself from the economic burden resulting from third-party negligence. The court states, *supra* at 1138-1139:

> Furthermore, contractual allocation of risk by private parties better accomplishes the goal of allocating risk. Private parties, rather than courts, are better able to assess the risks of non-collection and to decide who is in the best position to collect a judgment. Sophisticated maritime parties, intertwined in contractual relationships, can usually foresee the risk of insolvency and can allocate or insure against it. For example, Penrod [the employer] and MIS were in a position to address the risk of insolvency when they wrote their contract. Coats [the employee] had no such "bargaining" position. Indeed, "where potential co-defendants can contract in advance regarding their apportionment obligations among themselves, rules that leave both traditional joint and several liability and traditional apportionment rights in place might create optimal incentives and be consistent with equitable concerns." 2 American Law Institute, Enterprise Responsibility for Personal Injury 156 (1991). The rules now in place are clear and easily administered. They leave the allocation of the risks of non-collection to the parties best equipped to evaluate these risks. Absent Congressional intervention, private ordering of the risks is far superior to the proposed effort. Our ability by definition is inferior to the market's ability to tailor and allocate these risks.

It is widely recognized that, at present, virtually all FELA cases settle prior to trial (most before commencement of any suit) and that

---

indemnity to the employer, depending upon the nature and interrelationship of the employer's and the other party's negligence."

an expeditious system of recovery is in place. 11 Am. Jur. Trials FELA Litigation § 125. Judicially reshaping the FELA in the manner proposed by the railroad industry would result in many more trials in FELA cases where third-party negligence is also involved, to the detriment of an injured worker's speedy recovery, and imposing an additional and unnecessary burden upon both the state and Federal judiciary.

II. THE POSITION ADVOCATED BY THE RAILROAD INDUSTRY THREATENS TO WEAKEN THE FEDERAL EMPLOYERS' LIABILITY ACT IN NUMEROUS FUNDAMENTAL RESPECTS.

The facts at the core of this specific litigation, involving toxic inhalation over a period of many years, and claims by the employer that much of this toxic exposure resulted from causes other than railroad work, are not representative of the typical FELA action where principles of joint and several liability are applied. As discussed above, application of the principle that an employer railroad is liable for all damages caused in whole or in part by its negligence (save for damages caused by contributory negligence attributable to the employee) typically arises in a context where a railroad worker has been injured when sent by his employer to work upon unsafe property or equipment owned by another railroad or industry, or is hurt because of the negligent acts of third parties to whom he has been exposed by his employer, while performing the duties of his employment.[4] Despite the unusual facts of this case, the railroad industry has seized upon this litigation as a vehicle to attempt to negate and undermine central Congressional objectives behind the FELA in *all* FELA actions. In addition to overturning the principle of liability which has been at the core of the FELA for nearly a century, adoption of the position advocated by the railroad industry

---

[4]The proper application of joint and several liability principles under the facts of this specific case is discussed in Respondent's briefing, and will not be reiterated here.

would abrogate numerous other important rights and protections which Congress intended to provide to injured railroad workers under the Federal Act.

A. The Position Advocated by the Railroad Industry Would Negate Congress' Intention to Create a Uniform Right and Remedy for Injured Railroad Workers, and Make Their Recovery Dependent Upon the Vagaries of State Law.

One of the principal objectives of Congress in enacting the Federal Employers' Liability Act was to secure both uniformity of right and remedy of injured workers employed by railroads engaged in interstate commerce. *Chicago M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041 (1926); *New York C. R. Co. v. Winfield*, 244 U.S. 147, 150, 37 S.Ct. 546, 61 L.Ed. 1045 (1917). As stated by the Supreme Court of Missouri in *Graham v. Thompson*, 357 Mo. 1133, 212 S.W.2d 770, 773 (1948), *cert. den.* 335 U.S. 870, 69 S.Ct. 166, 93 L.Ed 414 (1948):

> The underlying basic reason for the enactment of the Federal Employers' Liability Act was to secure uniformity of both right and remedy in interstate commerce cases without regard to whether the action is brought in any state or in any Federal court. . . . To obtain such uniformity in all courts there had to be a dominant statute. Its purpose was to supplant the numerous state statutes and their varying applications in each state as to who could recover, against what railroad and under what circumstances. Congress chose to and did enact such a dominant statute. The Federal Employers' Liability Act "withdrew all injuries to railroad employees in interstate commerce from the operation of the varying state laws" and put all such actions under a national law of uniform operation in all states. *New York Central R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 547, 61 L.Ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139.

The position advocated by the railroad industry in this case would essentially destroy the national uniformity intended by Congress in enacting the FELA. In a broad category of cases, state law regarding issues of negligence and causation would once again become central to a railroad worker's ability to receive full compensation for his injury. An injured worker's right to recover in cases where third-party negligence was involved would come to vary from state to state, depending upon where his accident occurred. Certain common law impediments to recovery – which Congress intended to eliminate in enacting the FELA – would once again become dominant in railroad personal injury litigation. This is exactly the result Congress desired to avoid in establishing the FELA. As stated by the United States Supreme Court in *Winfield*, *supra at* 150, 547: "(I)t is not conceivable that Congress 'intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk,'" in actions brought under the FELA. (*Citing Seaboard Airline R. Co. v. Horton*, 233 U.S. 492, 501, 34 S.Ct. 635, 58 L.Ed. 1062 (1914)).

B. The Position Advocated by the Railroad Industry Would Effectively Eliminate the Railroad's Continuing, Non-delegable Duty to Provide Its Employees With a Safe Place to Work Under the FELA.

One of the central purposes of Congress in enacting the Federal Employers' Liability Act was to promote safety within the railroad industry. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 761-62, 2 L.Ed.2d 799 (1958). To this end, the United States Supreme Court has recognized that the FELA imposes upon railroads engaged in interstate commerce a continuing, non-delegable duty to provide their workers with a safe place in which to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). As stated by the United States Supreme Court in *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671, 10 L.Ed.2d 709 (1963):

> (A) railroad has the non-delegable duty to provide its employees with a safe place to work even when they are required to go on to the premises of a third party over which the railroad has no control. *See Kooker v. Pittsburgh & Lake Erie R. Co.*, 6th Cir., 258 F.2d 876; *Chicago Great Western R. Co. v. Casura*, 8th Cir., 234 F.2d 441; *Beattie v. Elgin, J. & E. R. Co.*, 7th Cir., 217 F.2d 863. These decisions are in accord with the opinions of this Court in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444; *Ellis v. Union Pac. R. Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 21, reversing 168 Ohio St. 582, 156 N.E.2d 822. . . . We hold that the B&O had a duty to inspect P.E. cars before permitting its employees to work with them.

The scope of a railroad's continuing, non-delegable duty to provide its employees with a safe place in which to work is noted in 11 Am. Jur. Trials, FELA Litigation, §§ 17, 18:

> It is recognized that the Federal Employers' Liability Act imposes on railroads a continuing non-delegable duty to use reasonable care to furnish the employee a safe place to work. This is a duty that becomes more imperative as the risk increases. *Bailey v. Central Vermont R. Co.* (1943) 319 U.S. 350, 87 L.Ed. 1444, 63 S.Ct. 1062.
>
> . . .
>
> This duty on the part of the carrier continues even when the carrier requires its employees to go upon other premises to work, so that the carrier may be held liable for breach of the duty even though the defect was in premises over which the railroad had no control. *Ellis v. Union Pac. R. Co.* (1947) 329 U.S. 649, 91 L.Ed. 572, 67 S.Ct. 598; *Harris v. Pennsylvania R. Co.* (1959) 361 U.S. 15, 4 L.Ed.2d 1, 80 S.Ct. 22; *Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1, 10 L.Ed.2d 709, 83 S.Ct. 1667. (Other citations deleted.) . . . Thus, the employer has a duty to inspect the premises of the third party before permitting his employee to work there, and may be held liable if it fails to make such an inspection and the employee is injured. *Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1, 10 L.Ed.2d 709, 83 S.Ct. 1667.

The continuing, non-delegable duty imposed under the FELA is made meaningful through the principle that employer railroads are deemed fully liable for all damages caused in whole or in part by their negligence, save those damages caused by the worker's contributory negligence. If adopted, the position advocated by the railroad industry would, in practical terms, mean that railroads no longer have a continuing, non-delegable duty to provide their employees with a safe place to work, but could avoid liability by shifting the blame to others. An already dangerous industry would become even more hazardous.

C. The Position Advocated by the Railroad Industry Would Undermine the Broad, Statutorily Unique Discretion Afforded to Injured Railroad Workers Under the FELA With Regard to Selection to Forum.

The right of an injured railroad worker to selection of forum under the FELA has long been regarded as an important, fundamental right afforded by Congress under the Act. Congress recognized that it would be unduly burdensome for railroad workers, frequently called upon to perform their duties in states far away from their homes, to be required to maintain suit where the accident occurred. A liberal venue provision was accordingly established under the FELA, providing injured railroad workers with broad and statutorily unique discretion in determining the forum in which their action will be tried. 45 U.S.C. § 56 provides in relevant part:

> Under this chapter, an action may be brought in a district court of the United States, in the district of the residence of

the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

The United States Supreme Court has recognized that under the FELA, choice of venue is a substantial, substantive right afforded by Congress to injured railroad workers. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263, 70 S..Ct. 26 (1949).

In establishing the liberal venue provisions of the FELA, Congress explicitly recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes." *Baltimore & O. R. Co. v. Kapner*, 314 U.S. 44, 49-50, 62 S.Ct. 6, 8, 86 L.Ed. 28 (1941), *citing* Senate Report No. 432, 60 1st Cong., 2d Sess. p. 4. If the position advocated by the railroad industry were adopted, injured railroad workers would, in a large class of cases, be forced to maintain suits at distant locations where their employers required them to work in order to obtain jurisdiction over potentially negligent third parties. Congress' intention to permit injured railroad workers to choose their legal forum would be effectively defeated.

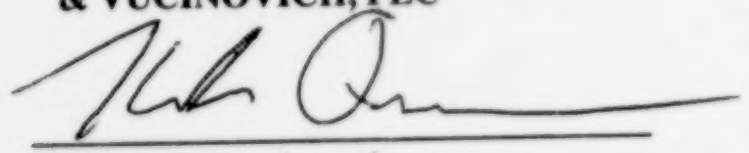
Congress clearly recognized that requiring injured railroad workers to bring suit in distant forums would, in many instances, be so impractical and cost prohibitive as to render the employee's right to recovery illusory. 45 Cong. Rec. at 4034-4035 (1910). For nearly a century, there has been no requirement that FELA claimants be forced to travel to distant locations to obtain full recovery for their injuries. This would no longer be true if the position advocated by the railroad industry were adopted.

CONCLUSION

Abolition of century-old joint and several liability principles central to the Federal Employers' Liability Act, as advocated by the railroad industry, would not simply destroy the system of liability which is at the core of the Act, but would disturb virtually every aspect of Congress' careful balancing of the railroad's and the employee's rights and responsibilities under the FELA. The railroad industry is attempting to utilize this case as a vehicle to fundamentally alter the governing principles of the FELA, and to limit the rights of employees hurt on the job, an objective it has not been able to accomplish legislatively. The facts of this case do not provide proper basis for this Court to fundamentally refashion the century-old Federal system of compensation enacted by Congress for the protection of injured railroad workers.

Respectfully submitted,

YAEGER, JUNGBAUER, BARCZAK & VUCINOVICH, PLC



William G. Jungbauer*
Keith A. Queensen
745 Kasota Avenue
Minneapolis, MN 55414
(612) 333-6371

Counsel for Amicus

August 19, 2002

**Counsel of Record*